NO. 48800-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JOHN MAYFIELD,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR COWLITZ COUNTY

The Honorable Stephen Warning, Judge
The Honorable Michael Sullivan, Judge

BRIEF OF APPELLANT

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1. The trial court erred in denying appellant's motion to suppress evidence under CrR 3.6.

2. The trial court erred in applying the federal attenuation doctrine under article I, section 7 of the Washington Constitution.

3. The trial court erred in concluding appellant's consent to search his person and vehicle sufficiently attenuated the search from the illegal seizure of appellant.

4. The trial court erred in entering conclusion of law 7.[1]

Issues Pertaining to Assignments of Error

Pursuant to a CrR 3.6 hearing, the trial court concluded the police unlawfully seized appellant. During the seizure, appellant consented to a search of his person and vehicle, where officers found methamphetamine.

1. Did the trial court correctly conclude appellant was illegally seized when a police officer began a drug investigation without any reasonable, articulable suspicion of criminal activity?

2. Did the trial court err in applying the federal attenuation doctrine under article I, section 7 of the Washington Constitution, where

[1] The trial court's written CrR 3.6 findings of fact and conclusions of law are attached to this brief as an appendix.

the doctrine is incompatible with our state constitution's nearly categorical exclusionary rule?

3. Even under the federal attenuation doctrine, was the search of appellant's person and vehicle unconstitutional where it followed immediately after the police illegally seized appellant, there were no intervening circumstances, the police were engaged in a fishing expedition for drugs, and appellant was never informed of his Miranda[2] rights?

4. Where the evidence found during the unconstitutional search of appellant's car was the only evidence of the crime, must appellant's conviction be dismissed with prejudice?

B. STATEMENT OF THE CASE

On January 7, 2015, the State charged John Mayfield with one count of violation of the Uniform Controlled Substances Act, specifically possession with intent to deliver methamphetamine, contrary to RCW 69.50.401(1) and (2)(b). CP 3-4. The State alleged that on January 3, 2015, Cowlitz County police officers found methamphetamine in Mayfield's vehicle after he voluntarily consented to a search. CP 1-2.

Before trial, Mayfield moved to suppress all evidence discovered as a result of searching his person and his vehicle under CrR 3.6. CP 7-15. Mayfield argued he was unlawfully seized absent reasonable, articulable

[2] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

suspicion of criminal activity, which vitiated his consent to the searches. CP 7-15. The trial court held a CrR 3.6 hearing on July 14, 2015.

1. Substantive CrR 3.6 Evidence

Deputy Andrew Nunes testified that on January 3, he responded to a report by Derek Selte of an unknown vehicle parked in his driveway in Kelso, Washington. RP 4-6. Nunes described Selte's home as a "two-driveway residence attached to a church." RP 6. Nunes acknowledged the driveway was part of the church parking lot, so it did not look like the driveway belonged to the house. RP 18-19. Once arriving at the house, Nunes called Sergeant Cory Huffine for backup. RP 10.

Selte told Nunes he arrived home to find a truck in his driveway, and a man, later identified as Mayfield, sleeping in the driver's seat. RP 6. Selte tried to wake Mayfield up several times, and at one point Mayfield woke up briefly then fell back asleep. RP 7. Selte was finally able to wake Mayfield and told Mayfield to leave or he would call the police. RP 7. Mayfield attempted to put his vehicle in reverse, but the "engine would just rev but nothing would go." RP 7. Mayfield eventually exited the vehicle on the passenger side. RP 7.

When Nunes arrived shortly thereafter, Mayfield's truck was running and the passenger door open, so Nunes turned off the engine, placed the keys on the seat, and closed the passenger door. RP 8. Nunes did not notice

anything suspicious inside the truck. RP 8. Nunes saw Mayfield walking towards him on the other side of the street. RP 8. Nunes walked across the street, introduced himself, and starting talking with Mayfield. RP 8.

Nunes asked Mayfield why his vehicle was parked in Selte's driveway. RP 9. Mayfield initially said he stopped there because he needed to go to the bathroom. RP 9. Later in the conversation Mayfield said he was also experiencing some vehicle trouble. RP 9. Mayfield told Nunes he left his truck because "Mr. Selte was confrontational" and Mayfield "was concerned that he was going to be assaulted by Mr. Selte." RP 10. Mayfield explained he went to a friend's house down the road, but his friend was not home. RP 10. Huffine arrived sometime during this conversation and stood "[r]ight next" to Mayfield. RP 28.

At this point, Nunes explained he did not suspect Mayfield of "a specific crime, but the facts seemed strange for the circumstances, where the vehicle was at and kind of his explanation." RP 11. Nevertheless, Nunes asked Mayfield for his identification and confirmed Mayfield was the registered owner of the truck. RP 12, 20. Nunes also confirmed Mayfield did not have any outstanding warrants. RP 12. Nor did Nunes observe any signs that Mayfield was under the influence of drugs or alcohol. RP 23.

But Nunes did not end his contact with Mayfield there, explaining "[d]ispatch advised me he was a convicted felon and DOC-active" for a

weapons incident with an incendiary device. RP 22. Nunes was not aware Mayfield had any prior drug offenses. RP 22. Nunes went back to his patrol car and checked their local records database to see if they "had any history" on Mayfield. RP 12. Nunes did so "[j]ust because of the strange circumstances of the contact. I kind of wanted to see who I was dealing with. I had never personally met Mr. Mayfield, and with being a convicted felon and what was going on I wanted to see who he was." RP 12-13.

After checking the database, Nunes asked Mayfield "if he had anything on him that was illegal or that [Nunes] should be concerned about," like drugs or weapons. RP 13, 23. Mayfield said he did not. RP 13. Nor did Mayfield make any furtive or dangerous movements that gave Nunes cause to suspect he was armed. RP 23. Nunes also asked Mayfield if "he had ever used drugs," to which Mayfield responded "he had used three weeks ago." RP 15, 23.

Nunes then asked if Mayfield would consent to a search of his person and told Mayfield he did not have to consent. RP 13. Mayfield agreed, telling Nunes he did not have anything illegal on him. RP 13. Nunes agreed at that point he "did not suspect [Mayfield] of committing any specific crime." RP 23. Rather, he explained, he wanted to search Mayfield "[b]ased on him being a convicted felon and active DOC supervision and that history

that I had looked at in our record system indicated that there may be a drug aspect to this." RP 13-14.

Upon searching Mayfield's person, Nunes found around $464 in cash in Mayfield's front pocket, "crumpled up in several different wads," which Nunes thought was unusual because Mayfield's wallet was in his back pocket. RP 14. Nunes explained that based on his "history of dealing with investigating drug crimes," the wad of crumpled money was "consistent for people either purchasing or selling drugs." RP 14. Nunes examined the items in front of Mayfield and questioned him about them. RP 24.

Nunes returned Mayfield's wallet and cash, but said his attention shifted to Mayfield's truck because he suspected drugs were involved. RP 15. Nunes asked Mayfield if he "had anything illegal in his vehicle," which Mayfield denied. RP 15. Nunes then requested to search Mayfield's vehicle. RP 16. Nunes gave Mayfield Ferrier[3] warnings: "that he had the right to refuse the search, he could restrict the search, and he could revoke the search at any time." RP 16. Mayfield said he had nothing to hide and consented to the search. RP 16. Nunes did not inform Mayfield of his Miranda rights. RP 25.

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[3] State v. Ferrier, 136 Wn2d 103, 960 P.2d 927 (1998). The Ferrier court held police officers "must, prior to entering the home, inform the person from whom consent is sought that he or she may lawfully refuse to consent to the search and that they can revoke, at any time, the consent that they give, and can limit the scope of the consent to certain areas of the home." Id. at 118. Failure to give these warnings vitiates any subsequent consent. Id. at 118-19.

During the search, Nunes stationed Mayfield next to the truck with Sergeant Huffine. RP 17. Inside the vehicle, Nunes found "numerous small baggies on the driver's side floorboard," most of which were empty but some had residue in them. RP 17. On the passenger side floorboard, Nunes found a bag containing 24 grams of methamphetamine. RP 17, 197.

Mayfield testified at the CrR 3.6 hearing that he had parked in the driveway because he was tired. RP 26-27. He explained he awoke to Selte "cussing at me, telling me to get the heck of their property, they were calling the police." RP 27. Mayfield was startled and afraid of a physical confrontation, so he "ended up running out the other door," down the road to a friend's house. RP 27.

Mayfield started walking back to his truck when he saw a police officer there and figured it was safe to return. RP 27. When Nunes approached him on the street, Mayfield "felt that, you know, I was to stop and talk to him." RP 28. As Nunes began asking him questions and Huffine stood next to him, Mayfield said did not feel free to leave. RP 29. When Nunes started asking him about his drug use, Mayfield believed they were investigating him for a crime. RP 29, 31.

Upon Nunes's request to search Mayfield's person, Mayfield did not feel any realistic ability to refuse consent, because "they were going to do it anyway." RP 30. Mayfield said the same of the request to search his truck:

"They probably would have searched anyway." RP 31. Throughout the encounter, Mayfield felt "scared" because "they were questioning [him] a lot" and acting like he "did something wrong." RP 30-31.

2. Parties' CrR 3.6 Arguments and Trial Court's Ruling

Mayfield argued he was illegally seized, which vitiated his consent to search. RP 46. Mayfield agreed the initial contact was lawful, but asserted it transformed into an illegal seizure once Nunes started questioning him about drugs and weapons. RP 47. Mayfield pointed out Nunes admitted at that point he had no articulable suspicion that Mayfield had committed a crime or was under the influence of drugs or alcohol. RP 47. Mayfield argued his consent to search did not cure the illegal seizure because they were contemporaneous, with no intervening circumstances. RP 50. Furthermore, there was no valid purpose in continuing to detain his, only a fishing expedition, and he was never read his Miranda rights. RP 50-51, 58-59.

The State's position was that the continuing detention was legal, despite acknowledging "Deputy Nunes can't point to a specific crime that the defendant has committed during this contact." RP 51-55. The State asserted "[t]here's something going on here," though Nunes "cannot say" what it is. RP 55. The State agreed the seizure and consent to search were close in time and there were no significant intervening circumstances. RP 56. The State further acknowledged the officers did not inform Mayfield of

his Miranda rights, but claimed "[t]he case law holds that Ferrier warnings in this case are just as important as Miranda warnings." RP 57. The State argued claimed the Ferrier warnings "dispel[led] any illegally in terms of the consent," and so the evidence should be admissible. RP 57.

In its oral ruling, the trial court found Mayfield's explanations for having parked in the driveway were inconsistent, but that "certainly didn't rise to the level of any criminality." RP 60. Though Nunes found Mayfield's answers unsatisfactory, Nunes "didn't get any information that resulted in him believing that a crime was occurring right then." RP 60. The wad of money in Mayfield's pocket made Nunes "additionally suspicious but again not rising to the level of any criminality." RP 60. The court accordingly found, "at the point [Nunes] was asking those questions, I don't think there's much question Mr. Mayfield is being illegally held." RP 61.

The trial court then considered whether the search was sufficiently attenuated from the illegal seizure, applying the federal attenuation doctrine. RP 61. The court reasoned "[t]he temporal proximity of his detention and the subsequent consent, they were very close together, which argues in favor of suppression." RP 61. The court found no significant intervening circumstances, noting the situation was "weird but not criminal." RP 61. The court likewise found Deputy Nunes acted purposefully in pursuing a drug investigation absent reasonable suspicion of criminal activity. RP 61-

62. However, the court concluded that giving Ferrier warnings sufficiently attenuated the search from the illegal seizure, and denied the motion to suppress. RP 62.

After the hearing, the trial court entered the following written conclusions of law:

> 1. At the time of the initial contact between Deputy Nunes and the defendant, the defendant was not seized. Deputy Nunes' conversation was an attempt to determine why the defendant's vehicle had been parked in Mr. S[e]lte's driveway.
>
> 2. The defendant was seized when Deputy Nunes began asking questions about the defendant's drug use, whether he would have anything illegal on his person, and when he sought permission to conduct a pat-down search of the defendant's person.
>
> 3. The seizure of the defendant was illegal. Deputy Nunes did not have reasonable and articulable suspicion that the defendant was engaged in criminal activity.
>
> 4. The temporal proximity of the defendant's detention and his subsequent consent to search his truck were very close together.
>
> 5. There were no significant intervening circumstances between the defendant's detention and his subsequent consent to search his truck.
>
> 6. The purpose of Deputy Nunes' conduct was to determine why the defendant has been parked at Mr. S[e]lte's residence. However, Deputy Nunes' contact became a drug investigation that was not based upon any reasonable and articulable suspicion of actual criminal conduct.

> 7. Deputy Nunes provided the defendant with his Ferrier warnings prior to receiving consent to search his truck. The giving of Ferrier warnings under these circumstances sufficiently attenuates search from any illegal detention.

CP 20.

3. Jury Trial and Sentencing

The parties proceeded to a jury trial in February 2016. Nunes's trial testimony was similar to his CrR 3.6 testimony. He explained the baggies he found in Mayfield's truck were consistent with drug packaging and the amount of methamphetamine found was consistent with sale quantity. RP 152-54. Nunes further testified that after discovering the drugs, he placed Mayfield under arrest. RP 154. Mayfield denied ownership of the drugs, explaining his friend Kayla Blower possibly left the bag in his truck. RP 155, 178-19. Huffine testified he read Mayfield his Miranda rights after Nunes found the methamphetamine and arrested Mayfield. RP 188-89.

The jury was instructed on the charged crime of possession with intent to deliver methamphetamine, as well as the lesser crime of simple possession. CP 45-48. The jury found Mayfield guilty as charged. CP 52; RP 358-62. The trial court sentenced Mayfield to 40 months confinement. CP 58-60; RP 381.

Mayfield filed a timely notice of appeal. CP 68.

C. ARGUMENT

THE WARRANTLESS SEARCH OF MAYFIELD'S PERSON AND VEHICLE DURING AN ILLEGAL SEIZURE VIOLATED ARTICLE I, SECTION 7 OF THE WASHINGTON CONSTITUTION AND THE FOURTH AMENDMENT.

When a trial court denies a motion to suppress, this Court reviews the trial court's conclusions of law de novo. State v. Winterstein, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009). The trial court correctly concluded Mayfield was illegally seized when Deputy Nunes began a drug investigation without reasonable, articulable suspicion of criminal activity.

However, the trial court erred in two ways. First, the court erroneously applied the federal attenuation doctrine under article I, section 7 of the Washington Constitution. The doctrine is incompatible with our state constitution's nearly categorical exclusionary rule. Second, even under the attenuation doctrine, the trial court wrongly concluded that giving Ferrier warnings sufficiently attenuated the search of Mayfield's person and his vehicle from the illegal seizure. The U.S. Supreme Court has long held that giving such warnings, alone, does not cure the taint of an illegal seizure. The trial court should have suppressed the evidence of methamphetamine because Mayfield's consent to search was vitiated by the illegal seizure. This Court should reverse Mayfield's conviction and remand with instructions to dismiss the charge with prejudice.

1. The trial court correctly concluded Mayfield was illegally seized when Deputy Nunes began a drug investigation without reasonable, articulable suspicion of criminal activity.

"As a general rule, warrantless searches and seizures are per se unreasonable, in violation of the Fourth Amendment and article 1, section 7 of the Washington State Constitution." State v. Duncan, 146 Wn.2d 166, 171, 43 P.3d 513 (2002). The State bears the "heavy burden" of demonstrating a warrantless search or seizure falls into one of the "'jealously and carefully drawn'" exceptions to the warrant requirement. State v. Jones, 146 Wn.2d 328, 335, 45 P.3d 1062 (2002); State v. Doughty, 170 Wn.2d 57, 61, 239 P.3d 573 (2010) (quoting State v. Williams, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984)).

The Terry[4] stop—a brief investigatory seizure—is one such exception. Doughty, 170 Wn.2d at 61-62. A Terry stop requires "a well-founded suspicion that the defendant engaged in criminal conduct." Id. at 62. "'[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.'" Id. (quoting Terry, 392 U.S. at 21). An officer's "inarticulate hunch[]" is insufficient. Id. (quoting Terry, 392 U.S. at 22).

[4] Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

The reviewing court "must evaluate the totality of circumstances presented to the investigating officer." Id. These circumstances are judged against an objective standard. Terry, 392 U.S. at 21-22. The officer's actions "must be justified at their inception," meaning circumstances arising after the seizure begins cannot inform the analysis. State v. Gatewood, 162 Wn.2d 534, 539, 182 P.3d 426 (2008); accord Terry, 392 U.S. at 21-22 (considering only "facts available to the officer at the moment of the seizure").

Whether police have seized a person is a mixed question of law and fact. State v. Harrington, 167 Wn.2d 656, 662, 222 P.3d 92 (2009). "'The resolution by a trial court of differing accounts of the circumstances surrounding the encounter are factual findings entitled to great deference,' but 'the ultimate determination of whether those facts constitute a seizure is one of law and is reviewed de novo.'" Id. (quoting State v. Armenta, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997)).

Two cases are particularly analogous to Mayfield's case: Harrington and State v. Soto-Garcia, 68 Wn. App. 20, 841 P.2d 1271 (1992). Harrington was walking along a sidewalk late at night when an officer asked to talk to him. 167 Wn.2d at 660. Harrington voluntarily answered the officer's questions, though some of his answers made the officer suspicious. Id. at 660-61. The officer noticed bulges in Harrington's pockets, so when

Harrington put his hands in his pockets, the officer asked him to remove them. Id. at 661. Another officer coincidentally drove by and decided to stop. Id. The second officer stood seven or eight feet away, but did not speak to Harrington. Id. The first officer then asked if he could pat down Harrington for officer safety, to which Harrington answered, "Yeah." Id. The officer found a methamphetamine pipe in Harrington's pocket. Id. at 661. The officer then arrested Harrington and found methamphetamine after searching him incident to arrest. Id. at 661-62.

The Washington Supreme Court held the officers' escalating actions, culminating in the request to frisk Harrington, resulted in an unlawful seizure under article I, section 7. Id. at 670. The court explained the officer's initial interaction with Harrington was a lawful social contact that did not rise to the level of a seizure. Id. at 665. However, three subsequent events "quickly dispelled the social contact" and "escalated the encounter to a seizure": (1) the arrival of the second officer, (2) the request for Harrington to remove his hands from his pockets, and (3) the request to frisk. Id.

For the first event, the court noted Harrington undoubtedly noticed the second officer's presence. Id. at 666. This "would cause a reasonable person to think twice about the turn of events," and contributed to the eventual seizure. Id. Second, the request for Harrington to remove his hands from his pockets "adds to the officer's progressive intrusion and moves the

interaction further from the ambit of valid social contact." Id. at 667. Finally, when the officer asked to frisk Harrington, the "series of actions matured into a progressive intrusion substantial enough to seize Harrington," absent any articulable facts that Harrington was armed and dangerous. Id. at 669-70. The court concluded this "progressive instruction, culminating in seizure," ran afoul of article I, section 7. Id. at 670. Because Harrington's consent to search was obtained through exploitation of the illegal seizure, suppression of the evidence was necessary. Id.

In reaching this conclusion, the Harrington court discussed Soto-Garcia with approval. In Soto-Garcia, an officer initiated a social contact as Soto-Garcia walked out of an alley late at night in an area known for cocaine trafficking. 68 Wn. App. at 22. Soto-Garcia voluntarily walked over to the officer, who asked Soto-Garcia where he was coming from and where he was going, which Soto-Garcia answered. Id. Soto-Garcia produced his identification upon the officer's request. Id. Soto-Garcia had no outstanding warrants. Id. at 25. The officer then asked Soto-Garcia if he had any cocaine on his person, which Soto-Garcia denied. Id. The officer requested to search Soto-Garcia, to which Soto-Garcia responded, "Sure, go ahead." Id. The officer found cocaine in Soto-Garcia's shirt pocket. Id.

This Court concluded Soto-Garcia was unlawfully seized when the officer asked if Soto-Garcia had cocaine and if he could search him, without

reasonable, articulable suspicion of criminal activity. Id. at 23-25. The atmosphere created by the officer's "progressive intrusion into Soto-Garcia's privacy was of such a nature that a reasonable person would not believe that he or she was free to end the encounter." Id. This Court held suppression of the cocaine was proper because "Soto-Garcia's consent to the search was obtained through exploitation of his prior illegal seizure." Id. at 29.

The court in Harrington, 167 Wn.2d at 669, succinctly summarized the progressive intrusion in Soto-Garcia—"inquiry about Soto-Garcia's identification, warrant check, direct question about drug possession, and request to search"—all of which combined to form a seizure. The same occurred in Mayfield's case.

The trial court concluded Mayfield was not seized during the initial encounter with Deputy Nunes. CP 20. Deputy Nunes contacted Mayfield to ask him questions about why he left his truck in Selte's driveway. RP 9. Mayfield explained he pulled over to use the restroom, then later said he was also having vehicle trouble. RP 9. These two explanations did not actually conflict, and the latter was consistent with Selte's observation that Mayfield had attempted to put his truck in reverse, but the engine just revved and the truck would not move. RP 7. Mayfield explained he fled his truck because he was afraid of Selte assaulting him, which was also consistent with Selte's statement that he told Mayfield to leave or he would call the police. RP 6-7.

Even if inconsistent, the trial court found Mayfield's explanations "certainly didn't rise to the level of any criminality." RP 60. This is supported by Harrington, where some of Harrington's answers made the officer suspicious, but did not establish criminal activity. 167 Wn.2d at 669.

Sergeant Huffine arrived sometime during this questioning and stood "[r]ight next" to Mayfield. RP 28. As in Harrington, Huffine's arrival and close proximity to Mayfield contributed to the escalating police intrusion. Nunes then asked Mayfield for his identification. RP 12, 20. Nunes confirmed Mayfield did not have any outstanding warrants and was the registered owner of the truck. RP 12. Nunes did not observe any signs that Mayfield was under the influence of drugs or alcohol. RP 23. Nor did Mayfield make any furtive or dangerous movements that suggested he might be armed. RP 23. At that point, Nunes thought the circumstances were odd, but admitted he did not suspect Mayfield of "a specific crime." RP 11. There was no further reason to detain Mayfield.

Despite lacking any reasonable, articulable suspicion of a crime, Nunes's contact did not end there. Nunes explained he noticed Mayfield had a felony history and was currently under DOC supervision for a weapons incident, so he "kind of wanted to see who [he] was dealing with." RP 12-13, 22. But Nunes could not point to any facts that made him suspect Mayfield was presently armed or dangerous. Merely being a convicted felon

does not give rise to reasonable, articulable suspicion of criminal activity. State v. Hobar, 94 Wn.2d 437, 446-47, 617 P.2d 429 (1980) ("If a prior conviction, not to mention a prior arrest, should afford grounds for believing that an individual is engaging in criminal activity at any given time thereafter, that person would never be free of harassment, no matter how completely he had reformed.").

Nevertheless, like Harrington and Soto-Garcia, Nunes decided to ask Mayfield "if he had anything on him that was illegal or that [Nunes] should be concerned about," like drugs or weapons. RP 13, 23. When Mayfield said no, Nunes asked if Mayfield had ever used drugs, to which Mayfield acknowledged he had three weeks prior. RP 15, 23. Claiming this piqued his interest, Nunes requested to search Mayfield's person, to which Mayfield consented. RP 13. Nunes admitted he still "did not suspect [Mayfield] of committing any specific crime." RP 23. Rather, Nunes wanted to search Mayfield solely "[b]ased on him being a convicted felon and active DOC supervision and that history that I had looked at in our record system indicated that there may be a drug aspect to this." RP 13-14.

The trial court correctly concluded Mayfield was seized when Deputy Nunes began asking questions about Mayfield's drug use, whether Mayfield had anything illegal on his person, and then requested to search him. CP 20 (Conclusion of Law 2). This conclusion is well supported by

Harrington and Soto-Garcia. Like those cases, Nunes asked Mayfield a direct question about whether he had illegal items on his person and then asked to frisk him, all while a second officer was standing close by. These progressive intrusions escalated the encounter to a seizure.

The trial court also correctly concluded the seizure was illegal because Deputy Nunes lacked reasonable, articulable suspicion that Mayfield was engaged in criminal activity. CP 20 (Conclusion of Law 3). Nunes admitted that nothing about the encounter suggested Mayfield was using or selling drugs, or that he was armed and dangerous. While the circumstances of Mayfield parking in Selte's driveway were odd, there was nothing criminal about them, as the trial court recognized. RP 60.

Instead of ending contact after he confirmed Mayfield had no outstanding warrants and was the registered owner of the truck, however, Nunes began questioning Mayfield based on an inarticulate hunch of possible drug activity. Because the officers' progressive intrusion was unwarranted based on the totality of the circumstances, this Court should hold the trial court correctly concluded Mayfield was illegally seized when Nunes began a drug investigation absent reasonable, articulable suspicion of criminal activity.

2. The federal attenuation doctrine violates article I, section 7, so the evidence should have been suppressed under the Washington Constitution.

Article I, section 7 provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." While the Fourth Amendment precludes only "reasonable" searches, article I, section 7 prohibits any search "without authority of law."[5]

When police engage in a search or seizure in violation of article 1, section 7, "all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed." State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999). This strict rule applies not only to evidence obtained during an illegal search or seizure, but also evidence derived therefrom, and "'saves article 1, section 7 from becoming a meaningless promise.'" State v. Gaines, 154 Wn.2d 711, 716-17, 116 P.3d 993 (2005); Ladson, 138 Wn.2d at 359 (quoting Sanford E. Pitler, The Origin and Development of Washington's Independent Exclusionary Rule: Constitutional Right and Constitutionally Compelled Remedy, 61 WASH. L. REV. 459, 508 (1986)).

[5] Because the privacy protections of article I, section 7 are more extensive than those provided by the Fourth Amendment, York v. Wahkiakum School District No. 200, 163 Wn.2d 297, 306, 178 P.3d 995 (2008), this brief first analyzes whether the search of Mayfield's person and vehicle was lawful under the Washington Constitution. Mayfield alleges error, however, under both the state and federal constitutions.

The Washington Supreme Court has recently reaffirmed that, unlike the federal exclusionary rule, Washington's rule is "nearly categorical," rejecting both the federal "good faith" and "inevitable discovery" exceptions. State v. Afana, 169 Wn.2d 169, 180, 233 P.3d 879 (2010) (good faith); Winterstein, 167 Wn.2d at 636 (inevitable discovery). The question in this case is whether the federal attenuation exception also runs afoul of article 1, section 7.[6]

"In determining the protections of article 1, section 7 in a particular context, 'the focus is on whether the unique characteristics of the state constitutional provision and its prior interpretations actually compel a particular result.'" State v. Chenoweth, 160 Wn.2d 454, 463, 158 P.3d 595 (2007) (quoting City of Seattle v. McCready, 123 Wn.2d 260, 267, 868 P.2d 134 (1994)). The federal and state exclusionary rules are based on different concerns and aimed at achieving very different goals. While the federal attenuation doctrine (like the good faith and inevitable discovery doctrines) serves its intended goals under the Fourth Amendment, it is inconsistent with article 1, section 7's unique purpose and history.

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[6] Trial counsel did not specifically argue the federal attenuation doctrine was incompatible with article I, section, independently necessitating suppression under the Washington Constitution. See CP 7-12. However, courts review unlawful searches for the first time on appeal because they are manifest constitutional errors. State v. Harris, 154 Wn. App. 87, 224 P.3d 830 (2010).

Article 1, section 7's greater privacy protections are well established. State v. Morse, 156 Wn.2d 1, 10, 123 P.3d 832 (2005). While Fourth Amendment protections turn on the reasonableness of government action, article 1, section 7 "'clearly recognizes an individual's right to privacy with no express limitations." Afana, 169 Wn.2d at 180 (quoting State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982)).

This difference in purpose impacts the remedy available for any violation. With its focus on the reasonableness of officers' actions, the primary justification for excluding evidence under the Fourth Amendment is deterrence of police misconduct.[7] Herring v. United States, 555 U.S. 135, 141, 129 S. Ct. 695, 172 L. Ed. 2d 496 (2009); Michigan v. DeFillippo, 443 U.S. 31, 38 n.3, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979); Stone v. Powell, 428 U.S. 465, 486, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976). "The [federal] rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." Elkins v. United States, 364 U.S. 206, 217, 80 S. Ct. 1437, 4 L. Ed. 2d 1669 (1960).

As a creature of the federal exclusionary rule, the attenuation doctrine is heavily rooted in this same goal of deterring police misconduct.

[7] An additional, albeit more limited, justification for the exclusion of evidence under the Fourth Amendment is maintaining the integrity of the federal courts. Powell, 428 U.S. at 485-486; Wong Sun v. United States, 371 U.S. 471, 486, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

It requires federal courts to examine the admissibility of evidence "in light of the distinct policies and interests of the Fourth Amendment." Brown v. Illinois, 422 U.S. 590, 602, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975). Thus, in Brown, the U.S. Supreme Court refused to apply a "but for" rule of exclusion and, instead, adopted a case-by-case balancing approach for determining when the causal connection between a Fourth Amendment violation and subsequently discovered evidence is sufficiently attenuated. Id. at 603. Factors to consider under the doctrine are (1) temporal proximity of the unlawful detention and discovery of evidence, (2) the presence of intervening circumstances, (3) "and, particularly, the purpose and flagrancy of the official misconduct." Id. at 603-04. A fourth factor is whether Miranda warnings were given after the initial illegality. Id.

In his concurring opinion in Brown, Justice Powell elaborated on the connection between these factors and the distinct interests of the Fourth Amendment:

> [S]trict adherence to the Fourth Amendment exclusionary rule imposes greater cost on the legitimate demands of law enforcement than can be justified by the rule's deterrent purposes. The notion of the "dissipation of the taint" attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost.

Id. at 609 (Powell, J., concurring). Justice Powell continued, "[t]he basic purpose of the rule, briefly stated, is to remove possible motivations for illegal arrests." Id. at 610. "[T]he Wong Sun inquiry always should be conducted with the deterrent purpose of the Fourth Amendment exclusionary rule sharply in focus." Id. at 612.

The Supreme Court also focused on this goal of deterrence in another seminal attenuation case, United States v. Ceccolini, 435 U.S. 268, 98 S. Ct. 1054, 55 L. Ed. 2d 268 (1978). In Ceccolini, the Court examined the admissibility of a witness's trial testimony where that witness's information was discovered as a consequence of an unlawful search. Noting the federal rule's "broad deterrent purpose," the Court emphasized "'application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served.'" Id. at 275 (quoting United States v. Calandra, 414 U.S. 338, 348, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974)).

In short, the federal attenuation doctrine concedes a connection between the illegality and the evidence in question but, rather than automatically exclude the evidence, aims to determine whether deterrence of police misconduct requires that result.[8]

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[8] See New York v. Harris, 495 U.S. 14, 19, 110 S. Ct. 1640, 109 L. Ed. 2d 13 (1990) (attenuation analysis "appropriate where, as a threshold matter, courts determine that 'the challenged evidence is in some sense the product of illegal governmental activity.'" (quoting United States v. Crews, 445 U.S. 463, 471, 100 S. Ct. 1244, 63 L. Ed. 2d 537 (1980)); see also Nardone v. United States, 308

The Washington Supreme Court has never explicitly adopted the federal attenuation doctrine under article 1, section 7. State v. Smith, 177 Wn.2d 533, 552, 303 P.3d 1047 (2013) (Madsen, C.J., concurring in the result); id. at 559-60 (Chambers, J., dissenting); State v. Eserjose, 171 Wn.2d 907, 919, 259 P.3d 172 (2011) (plurality opinion); id. at 939-40 (C. Johnson, J., dissenting). While the court has employed or mentioned the doctrine in several cases, critically, in none of those cases did the appellant specifically challenge its compatibility with article 1, section 7 in light of its greater privacy protections.[9] See, e.g., Armenta, 134 Wn.2d at 10 n.7, 17; State v. Warner, 125 Wn.2d 876, 888-89, 889 P.2d 479 (1995); State v. Rothenberger, 73 Wn.2d 596, 600-01, 440 P.2d 184 (1968); State v. Vangen, 72 Wn.2d 548, 554-55, 433 P.2d 691 (1967).

Article 1, section 7's exclusionary rule is not tethered to the Fourth Amendment. Indeed, not until 1961 did the U.S. Supreme Court hold the

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U.S. 338, 340-341, 60 S. Ct. 266, 84 L. Ed. 307 (1939) ("Sophisticated argument may prove a causal connection between information obtained [illegally] and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint"; exclusion "must be justified by an over-riding public policy expressed in the Constitution").

[9] In Eserjose, Justice Alexander cited this line of cases in asserting the court had, "at least, implicitly adopted the attenuation doctrine." 171 Wn.2d at 920 (lead opinion). However, "[g]eneral statements in every opinion are to be confined to the facts before the court, and limited in their application to the points actually involved." State ex rel. Wittler v. Yelle, 65 Wn.2d 660, 670, 399 P.2d 319 (1965). The Washington Supreme Court's failure to ever consider the constitutionality of the attenuation doctrine under article 1, section 7 should not be deemed an implicit adoption.

Fourteenth Amendment compelled the extension of Fourth Amendment protections to defendants in state prosecutions. See generally Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961). By that time, Washington had applied a rule of automatic exclusion to article 1, section 7 violations for more than 40 years, frequently rejecting attempts to weaken the rule. See Pitler, supra, at 473-485.

In the years following Mapp, which compelled states to apply—at a minimum—the federal exclusionary rule, the Washington Supreme Court was content to simply rely upon federal precedent when ordering exclusion under article 1, section 7. Pitler, supra, at 486. "As long as the United States Supreme Court continued to require state courts to automatically apply the federal exclusionary remedy whenever they found a fourth amendment violation, the Washington court had little reason to independently apply the Washington exclusionary rule." Id. at 487. That changed, however, in light of the Burger Court's "retrenchment in the area of federally guaranteed civil liberties," triggering an eventual return to independent application of the rule of automatic exclusion under article 1, section 7. Id. at 487-488.

In White, the Washington Supreme Court declared a statute making it a crime to "obstruct a public servant" unconstitutionally vague. 97 Wn.2d at 95-101. White was arrested for violating the statute and subsequently confessed to a burglary. At issue was whether White's unlawful arrest

required suppression of the confession. Id. at 101. In DeFillippo, the U.S. Supreme Court (Justice Burger writing for the majority) upheld the defendant's arrest, and use of the fruits of that arrest, for violating a similar obstruction statute under the federal good faith exception to the Fourth Amendment exclusionary rule. White, 97 Wn.2d at 102.

In holding article 1, section 7 required suppression, the White court noted the difference in purpose behind the state and federal rules:

> The result reached by the United States Supreme Court in DeFillippo is justifiable only if one accepts the basic premise that the exclusionary rule is merely a remedial measure for Fourth Amendment violations. As a remedial measure, evidence is excluded only when the purposes of the exclusionary rule can be served. This approach permits the exclusionary remedy to be completely severed from the right to be free from unreasonable government intrusions. Const. art. 1, [§] 7 differs from this interpretation of the Fourth Amendment in that it clearly recognizes an individual's right to privacy with no express limitations.
>
> . . . We think the language of our state constitutional provision constitutes a mandate that the right to privacy shall not be diminished by the judicial gloss of a selectively applied exclusionary remedy. In other words, the emphasis is on protecting personal rights rather than on curbing governmental actions. This view toward protecting individual rights as a paramount concern is reflected in a line of Washington Supreme Court cases predating [Mapp], which first made the exclusionary rule applicable to the states. The important place of the right to privacy in Const. art. 1, [§] 7 seems to us to require that whenever the right is unreasonably violated, the remedy must follow.

Id. at 109-10 (footnotes omitted) (citations omitted). Recognizing DeFillippo controlled under the Fourth Amendment, the White court declined to follow it and held article 1, section 7 mandated exclusion of White's confession. Id. at 102, 112.

More recently, the Washington Supreme Court again highlighted the difference in purpose between the federal and state exclusionary rules:

> The federal exclusionary rule is a judicially-created prophylactic measure designed to deter police misconduct. It applies only when the benefits of its deterrent effect outweigh the cost to society of impairment to the truth-seeking function of criminal trials. In contrast, the state exclusionary rule is constitutionally mandated, exists primarily to vindicate personal privacy rights, and strictly requires the exclusion of evidence obtained by unlawful government intrusions.

Chenoweth, 160 Wn.2d at 472 n.14 (citing cases, including White). Given the material differences between the state and federal rules, it would be very odd indeed if Washington's exclusionary rule were tied to its Fourth Amendment counterpart. Examining the factors federal courts use to find the point at which the deterrent effect no longer justifies exclusion under the Fourth Amendment further highlights these differences.

Under the attenuation doctrine, the most important factor is "the purpose and flagrancy of the official misconduct." Brown, 422 U.S. at 604; see also Ceccolini, 435 U.S. at 279-80 (emphasizing there was "not the slightest evidence" the officer intended unlawful discovery of evidence).

Yet, this factor should be largely irrelevant under article 1, section 7 given its primary concern with protecting privacy rights. Under our provision, the purpose and flagrancy of the constitutional violation matters little. What matters is that there was a violation at all.

The same is true for the other attenuation factors. As previously noted, when deciding whether to suppress evidence obtained through an illegal search or seizure, federal courts weigh competing interests and examine the temporal proximity of the arrest and the discovery of evidence, the presence of intervening circumstances, and, as always, whether Miranda warnings were given. Brown, 422 U.S. at 603-04.

Again, while these factors may help federal courts in their cost-benefit analysis aimed at deterring police misconduct, they do not ensure the protection of Washington's greater privacy rights and are inconsistent with our "nearly categorical" exclusionary rule. Winterstein, 167 Wn.2d at 636. None of these factors converts a violation of article 1, section 7 into a non-violation or the fruits of that violation into non-fruit. As four justices in Eserjose emphasized, "Evidence obtained in violation of a person's constitutional rights, even if attenuated, still lacks the authority of law [required by article 1, section 7] and should be suppressed." 171 Wn.2d at 940 (C. Johnson, J., dissenting).

Rejecting the federal attenuation doctrine is also consistent with the reasoning in Winterstein, where the Washington Supreme Court found the inevitable discovery doctrine "necessarily speculative." 167 Wn.2d at 634. Inevitable discovery rests on the State's ability to prove, despite unlawful police conduct, the evidence in question would necessarily have been discovered through proper means. Id. at 634-35.

Attenuation is similarly speculative. Attenuation rests on the State's ability to prove, despite unlawful police conduct, the individual would have confessed or the evidence would have been discovered anyway. See Eserjose, 171 Wn.2d at 942 (Alexander, J., lead opinion) (positing Eserjose maintained his innocence until his accomplice confessed, "which suggests that it was this information, not the illegal arrest, that induced the confession"). In short, both doctrines call for a speculative hindsight examination of the same question: "What if the police had not acted unlawfully?" It is not clear why one would permissible under article I, section 7 and the other would not.

Indeed, in his concurrence in Ceccolini, Justice Burger—in arguing for a per se rule of non-exclusion for live testimony of witnesses discovered illegally—highlighted the speculative nature of the majority's test, describing it as "scholastic hindsight . . . in which speculation proceeds from unfounded hypotheses as to the probable explanations for the decision of a

live witness to come forward and testify." Ceccolini, 435 U.S. at 283 (Burger, C.J., concurring). Burger believed that only a per se rule could "alleviate the burden—now squarely thrust upon courts—of determining in each instance whether the witness possessed that elusive quality characterized by the term 'free will.'" Id. at 285.

On this one point, Justice Burger was correct: because the attenuation doctrine is inherently speculative, only a per se rule will suffice. But under article 1, section 7's "nearly categorical exclusionary rule," it is not the per se rule he envisioned. Winterstein, 167 Wn.2d at 636. This Court should hold that the federal attenuation doctrine—like the federal good faith and inevitable discovery exceptions—is incompatible with article 1, section 7.

Mayfield was illegally seized when Deputy Nunes began a drug investigation without a reasonable, articulable suspicion. Nunes discovered methamphetamine in Mayfield's vehicle during that ongoing unlawful seizure. That evidence is fruit of the poisonous tree and "must be suppressed" under article I, section 7, regardless of any attenuation. Ladson, 138 Wn.2d at 359. This Court should therefore hold the trial court erred in refusing to suppress the evidence discovered as a result of the illegal seizure.

3. Even under the attenuation doctrine, the consent to the search was not attenuated in time or place from the illegal detention and *Ferrier* warnings alone were insufficient to purge the taint of the illegal detention.

Even if this Court applies the federal attenuation doctrine, the search of Mayfield's person and vehicle was unconstitutional because Mayfield's consent was vitiated by the illegal seizure. Another exception to the general rule that warrantless searches are per se unreasonable is voluntary consent. State v. Reichenbach, 153 Wn.2d 126, 131, 101 P.3d 80 (2004). However, "[a] consent to search obtained through exploitation of a prior illegality may be invalid even if voluntarily given." Soto-Garcia, 68 Wn. App. at 27.

Armenta provides a useful starting point. There, the two defendants, Armenta and Cruz, were illegally seized when a police officer placed their money in his patrol car absent reasonable, articulable suspicion that they were engaged, or about to engage, in criminal activity. Armenta, 134 Wn.2d at 16. Armenta then consented to a search of his vehicle, where the officer found 260 grams of cocaine. Id. at 6-7.

Armenta did not dispute that he freely and voluntarily consented to a search of his vehicle. Id. at 16-17. Rather, the issue before the Washington Supreme Court was "whether the prior illegal detention vitiated that consent." Id. at 17. The court explained four factors, discussed above, are relevant in determining whether consent to a search is tainted by a prior

illegal seizure: (1) temporal proximity of the illegality and the subsequent consent, (2) the presence of significant intervening circumstances, (3) the purpose and flagrancy of the official misconduct, and (4) the giving of Miranda warnings. Id. (quoting Soto-Garcia, 68 Wn. App. at 27).

Applying these factors, the court concluded Armenta consented to the search immediately after the illegal seizure and "there were essentially no intervening circumstances." Id. Nor were Armenta or Cruz read their Miranda rights. Id. The court felt "certain" the officer was not acting maliciously, but believed it was "apparent that he was 'fishing' for evidence of illegal drug trafficking." Id. For instance, the officer admitted he had his "suspicions" and "wanted to get in the car." Id. The court therefore held "Armenta's consent, although voluntary, was tainted by the prior illegal detention." Id. Dismissal of the charges was the proper remedy. Id. at 18.

State v. Tijerina, 61 Wn. App. 626, 811 P.2d 241 (1991), discussed with approval in Armenta, is also instructive. There, a state trooper pulled Tijerina, who was Hispanic, over after seeing him cross two feet over the fog line on the freeway. 61 Wn. App. at 627-28. Tijerina's driver's license and registration were valid, so the trooper decided not to issue a citation. Id. at 628. This initial stop and request for Tijerina's was justified, given Tijerina crossing the fog line. Id. at 629.

However, when Tijerina opened the glove box to retrieve his registration, the trooper noticed several small bars of soap, the kind commonly given out at motels. Id. at 628. The trooper later testified he was aware of "dozens of investigations monthly in the motels [in the Spokane area] regarding Hispanics selling controlled substance[s]." Id. The trooper then asked Tijerina whether there were any guns or drugs in the vehicle, which Tijerina denied. Id. Immediately after, Tijerina consented to a search of his vehicle, where the trooper found cocaine. Id.

The appellate court explained that once the trooper decided not to issue a citation, any further detention had to be based on reasonable, articulable suspicion or criminal activity. Id. at 629. Being Hispanic and possessing motel-sized bars of soap "is innocuous and does not evidence suspicious criminal activity." Id. Thus, the court concluded, the trooper's "investigation after he decided not to issue a citation exceeded the scope of the initial stop and was improper unless Mr. Tijerina's subsequent consent to the search of his car sufficiently purged the taint of the illegal detention." Id.

The Tijerina court then applied to the four-factor test to make this determination. Id. at 630. There were no intervening circumstances between the illegal detention and the consent to search. Id. The purpose of the stop was satisfied when the trooper decided not to issue a citation and his subsequent conduct was based on unjustified suspicion. Id. No Miranda

warnings were given prior to obtaining Tijerina's consent. Id. "But for the illegal detention, the consent would not have been obtained." Id. The evidence therefore should have been suppressed. Id.

Eserjose provides a useful contrast. Upon receiving a credible tip that Eserjose and his housemate were responsible for a burglary, two officers went to Eserjose's father's home where all three men lived. Eserjose, 171 Wn.2d at 909-10 (Alexander, J., lead opinion). Eserjose's father let the officers in the house but did not give them permission to go upstairs to the bedroom area. Id. at 910. The officers disregarded the father's limited permission, went up the stairs, and arrested both suspects in the hallway. Id. Eserjose was then taken to the police station and, after being advised of his Miranda rights and being told his accomplice had implicated him, confessed to the burglary. Id. at 910-11.

Eserjose argued his confession should have been suppressed because he was unlawfully arrested. Id. at 912. There was no dispute the arrest was unlawful, because the Fourth Amendment prohibits officers from making a warrantless and nonconsensual entry into a suspect's home to effect an arrest. Id. Four justices concluded, however, that Eserjose's confession was untainted by the warrantless arrest, and a fifth justice concurred in the result. Id. at 925; id. at 930 (Madsen, J., concurring).

The lead opinion explained Eserjose maintained his innocence until he was informed his accomplice had confessed, "which suggests that it was this information, not the illegal arrest, that induced the confession." Id. at 923. Nor was the officers' conduct particularly flagrant because they entered Eserjose's home with consent and only exceeded the scope of consent when they went upstairs. Id. at 924. Furthermore, the officers had probable cause to arrest Eserjose before they entered his home. Id. at 925. Because that probable cause was not based on anything the officers observed during the arrest, it "was untainted by the warrantless arrest." Id.

Eserjose is distinguishable from U.S. Supreme Court cases Brown and Taylor v. Alabama, 457 U.S. 687, 102 S. Ct. 2664, 73 L. Ed. 2d 314 (1982). Brown was arrested without probable cause, read his Miranda rights, and confessed less than two hours later. 422 U.S. at 592-95, 604. The Court held "there was no intervening event of significance whatsoever" between the illegal arrest and Brown's confession. Id. at 604. The Court rejected a rule that Miranda warnings alone purge the taint of an illegal arrest, because the warnings "cannot assure in every case that the Fourth Amendment violation has not been unduly exploited." Id. at 603. The Court further noted the illegality of the arrest "had a quality of purposefulness." Id. at 605. The detectives "embarked upon this expedition for evidence in the hope that something might turn up," as evidenced by their later testimony that the

purpose of their action was "for investigation." Id. The Court accordingly reversed. Id.

The facts were similar in Taylor: Taylor was arrested without probable cause, read his Miranda rights three times, and confessed six hours later. 457 U.S. at 688-91. The Court concluded his confession should have been excluded at trial because there was no "meaningful intervening event" between the unlawful arrest and Taylor's confession. Id. at 691. Recognizing the clear holding of Brown, the Taylor Court held Miranda warnings were insufficient to break the connection between the illegal arrest and the confession. Id. at 690-91.

These cases demonstrate Mayfield's consent to search was not attenuated from the illegal seizure. As the trial court concluded, the temporal proximity of the illegal seizure and Mayfield's consent to search "were very close together." CP 20 (Conclusion of Law 4). As discussed in section C.1, supra, Mayfield was illegally seized when Deputy Nunes began asking him about his drug use, whether he had any illegal items on his person, and then requested to frisk Mayfield. Immediately thereafter, Nunes requested to search Mayfield's vehicle, to which Mayfield consented. RP 14-15. Nunes searched Mayfield's truck at the scene. RP 16-17. As demonstrated, even a gap of several hours constitutes close temporal proximity. The search of

Mayfield's truck occurred right after the illegal seizure, like Armenta and Tijerina, and significantly shorter than both Brown and Taylor.

Similarly, as the trial court concluded, there were no significant intervening circumstances between the illegal seizure and Mayfield's consent to search. CP 20 (Conclusion of Law 5). Like both Armenta and Tijerina, Deputy Nunes's request to search Mayfield's person and truck followed immediately after the illegal seizure. The seizure, request to search, and consent all happened in the same location within the span of a few moments. Nothing interrupted the fast-moving chain of events. This is readily distinguishable from Eserjose, where he was transported to the police station and confessed only upon learning his accomplice implicated him.

There was also a quality of purposefulness to Deputy Nunes's actions. Like Brown, there is no evidence Nunes acted maliciously. However, Nunes acknowledged that after he ran Mayfield's identification, he "did not suspect [Mayfield] of committing any specific crime." RP 23. Once Nunes verified Mayfield was the registered owner of the truck, had no outstanding warrants, and was not under the influence of drugs or alcohol, Nunes had no reason to continue the encounter. Like in Tijerina, Nunes should have sent Mayfield on his way. But, Nunes explained, he wanted to search Mayfield "[b]ased on him being a convicted felon and active DOC supervision and that history that I had looked at in our record system

indicated that there may be a drug aspect to this." RP 13-14. Nunes essentially engaged in a fishing expedition hoping to find drugs, given Mayfield's criminal history. Indeed, the trial court concluded Nunes acted purposefully in pursuing a drug investigation absent reasonable suspicion of any criminal activity. RP 61-62; CP 20 (Conclusion of Law 6).

Finally, no Miranda warnings were given until after the search of Mayfield's vehicle, when Mayfield was placed under arrest. RP 25, 188-89. The trial court nevertheless concluded: "Deputy Nunes provided the defendant with his Ferrier warnings prior to receiving consent to search his truck. The giving of Ferrier warnings under these circumstances sufficiently attenuates search from any illegal detention." CP 20 (Conclusion of Law 7). The trial court essentially concluded that the Ferrier warnings alone attenuated the search from the illegal seizure. But the four-part attenuation test considers whether Miranda warnings, not Ferrier warnings were given, even in search rather than confession cases. See, e.g., Armenta, 134 Wn.2d at 17; Tijerina, 61 Wn. App. at 630.

More significantly, though, Miranda or Ferrier warnings alone do not cure the taint of an illegal seizure. The U.S. Supreme Court has expressly held this in several cases. The Brown Court explained the reason for rejecting such a categorical rule:

> If Miranda warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted. Arrests made without warrant or without probable cause, for questioning or "investigation," would be encouraged by the knowledge that evidence derived therefrom could well be made admissible at trial by the simple [expedient] of giving Miranda warnings. Any incentive to avoid Fourth Amendment violations would be eviscerated by making the warnings, in effect, a "cure-all," and the constitutional guarantee against unlawful searches and seizures could be said to be reduced to "a form of words."

422 U.S. at 602-03 (footnote omitted) (citation omitted) (quoting Mapp, 367 U.S. at 648); see also Taylor, 457 U.S. at 690 (recognizing the fact that Miranda warnings are given and understood "is not by itself sufficient to purge the taint of the illegal arrest").

Proper Miranda or Ferrier warnings ensure only that confessions or consents to searches are "voluntarily given." Soto-Garcia, 68 Wn. App. at 27 (citing Taylor, Wong Sun, Tijerina, and other cases). In order for the causal chain to be broken after an illegal seizure, not only must the voluntariness standard be met, the confession or consent to search must also be "'"sufficiently an act of free will to purge the primary taint."'" Brown, 422 at 602 (quoting Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963)); accord Armenta, 134 Wn.2d at 16-17 (noting the issue

was not voluntariness, but whether the prior illegal detention vitiated Armenta's consent to search).

Mayfield's consent to search his person and his vehicle after Ferrier warnings establishes only that his consent was voluntary. It does not, by itself, attenuate the search from the illegal seizure, as the trial court concluded. Rather, the causal chain between the seizure and the search was short and unbroken. There was no great—or even minor—lapse of time or noteworthy intervening event between the seizure and the search. The two events were part of a short, continuous period of investigation. There can be no basis for separating the two—no justification for upholding one while denouncing the other. To hold otherwise would allow police to engage in illegal fishing expeditions so long as they give proper Miranda or Ferrier warnings. The U.S. Supreme Court has already denounced such a result.

The State may rely on State v. Jensen, 44 Wn. App. 485, 723 P.2d 443 (1986), to argue Ferrier warnings alone were sufficient to attenuate the search from the illegal seizure. There, a trooper stopped Jensen for speeding and discovered Jensen's license was suspended. Id. at 486. The trooper properly arrested Jensen, patted him down, and put in him the patrol car. Id. After the arrest, however, the trooper illegally searched Jensen's vehicle and found marijuana. Id. at 487. The trooper then read Jensen his Miranda rights and transported him to jail. Id. En route, Jensen orally consented to a

search of his vehicle and later signed a written "consent to search" form. Id. Police then found cocaine in Jensen's vehicle. Id. at 487-88.

Applying the Brown factors, two Division Three judges concluded Jensen's consent to search was not tainted by the prior illegal search. Id. at 490-91. Though Jensen gave his consent within two hours after the search, the court believed there were "substantial intervening circumstances":

> Mr. Jensen was advised after the illegal search and prior to his signing of the consent form that he could refuse to consent. In addition, in the intervening period, Mr. Jensen orally consented twice to the search. He also was allowed to call his sister, although she apparently did not answer.

Id. The court further noted Jensen was legally arrested, was read his Miranda rights immediately after the trooper discovered the marijuana, and was "not subjected to intimidating police misconduct." Id. at 491.

First and foremost, Jensen is distinguishable from Mayfield's case. Mayfield orally consented to the search of his truck only once. RP 15-16. He never signed a written consent to search form, as in Jensen. Nor did he have any significant time to consider and revoke his consent like Jensen did. Mayfield was also not given an opportunity to call any friends or family members. Further, Mayfield was illegally seized and investigated for drugs absent reasonable, articulable suspicion, unlike Jensen, who was lawfully arrested. Mayfield felt "scared" during the encounter because Nunes was asking a lot of questions and acting like Mayfield "did something wrong."

RP 30-31. Mayfield believed the officers "probably would have searched anyway" if he refused consent. RP 31.

Furthermore, this Court is not required to follow Division Three's holding that Jensen's consent to search constituted a significant, intervening circumstance. Nor should it. Jensen is inconsistent with Brown and Taylor, which held warnings alone are insufficient to purge the taint of an illegal arrest. In fact, Jensen is remarkably similar to Taylor, where the confession was held inadmissible. There, after Taylor was arrested, he was read his Miranda rights three times, signed a "waiver-of-rights" form, and visited with his girlfriend and male companion before confessing. 457 U.S. at 691. The Taylor Court held the "State's reliance on the giving of Miranda warnings is misplaced." Id. As discussed, confession or consent to search following proper warnings establishes only that the confession or consent to search is voluntary. The Jensen court conflated these two considerations.

The Jensen holding drew a dissent on this very point. 44 Wn. App. at 493-94 (McInturff, J., dissenting) (explaining the "crux" of his disagreement with the majority "is its holding there were substantial intervening circumstances between the illegal search and Mr. Jensen's consent."). The dissenting judge noted the U.S. Supreme Court in Brown

and Washington Supreme Court in Byers[10] reversed the defendants' convictions "on the ground that their confessions were tainted although made following Miranda warnings which advised them they had the right to refuse to talk to the police." Id. at 494. The courts in both cases held there were no significant intervening events between the arrests and the confessions, despite proper Miranda warnings. Id. The dissenting judge thus reasoned:

> [The facts of Jensen's case] support a finding that Mr. Jensen's consent was voluntary under the Fifth Amendment, but they are immaterial to the issue of whether the consent was fruit of the illegal search and, thus, was obtained in violation of the Fourth Amendment. The purpose of the exclusionary rule, promoting respect for the Fourth Amendment, would be eroded if law enforcement personnel could cure their illegal conduct by properly handling other aspects of a case.

Id. at 494-95. He therefore would have held, correctly, that Jensen's consent was tainted by the illegal search, because that illegal action commenced an "unbroken chain of events leading to Mr. Jensen's conviction." Id. at 195.

Methamphetamine was found in Mayfield's vehicle only after he consented to the search. His consent to search was vitiated by the illegal seizure, because it occurred immediately after the seizure, with no significant intervening circumstances. The evidence should have been suppressed as fruit of the poisonous tree. Armenta, 134 Wn.2d at 17-18. Without the

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[10] State v. Byers, 88 Wn.2d 1, 559 P.2d 1334 (1977), overruled on other grounds, State v. Williams, 102 Wn.2d 733, 689 P.2d 1065 (1984).

evidence obtained from the unconstitutional search of Mayfield's person and vehicle, the State cannot prove possession with intent to deliver a controlled substance. In such circumstances, this Court must reverse Mayfield's conviction and remand for dismissal of the charge with prejudice. Id.

D. CONCLUSION

Unlawfully obtained evidence formed the sole basis for Mayfield's conviction. This Court should reverse Mayfield's conviction and remand for the trial court to dismiss the charge with prejudice.

DATED this 18th day of November, 2016.

Respectfully submitted,

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